A

Mohd Khairul Azlan bin Mohd Napi lwn Pendakwa Raya

B

MAHKAMAH TINGGI (TEMERLOH) — PERMOHONAN JENAYAH NO CB-44–5–07 TAHUN 2021
ROSLAN MAT NOR PK
6 OGOS 2021

C

Prosedur Jenayah — Penghukuman — Penangguhan pelaksanaan — Pemohon disabitkan bersalah atas petuduhan di bawah s 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 dan dijatuhi hukuman penjara enam tahun penjara, tiga kali sebatan dan pengawasan polis selama satu tahun — Mahkamah Tinggi menolak notis usul permohonan penangguhan pelaksanaan — Pemohon memfailkan semula permohonan penangguhan pelaksanaan di Mahkamah Tinggi — Sama ada Mahkamah Tinggi mempunyai bidang kuasa mendengar notis usul yang telah diputuskan oleh hakim Mahkamah Tingi yang terdahulu — Sama ada pemohon telah menujukkan keadaan khas untuk penangguhan pelaksanaan perintah — Kanun Tatacara Jenayah s 311

D

E

Pemohon telah disabitkan dengan pertuduhan di bawah s 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 dan dijatuhi hukuman penjara enam tahun penjara, tiga kali sebatan dan pengawasan polis selama satu tahun. Pemohon telah memfailkan notis usul di mahkamah ini

F

bagi memohon penangguhan pelaksanaan hukuman dan jaminan sementara menunggu rayuan di Mahkamah Tinggi ('permohonan pemohon'). Notis usul yang sama telah difailkan di Mahkamah Tinggi Malaya di Temerloh dan permohonan tersebut telah ditolak oleh hakim Mahkamah Tinggi. Dalam permohonan pemohon ini, pemohon menyatakan bahawa dia mempunyai

G

masalah kesihatan iaitu berpenyakit kencing manis dan tekanan darah tinggi. Isu-isu yang perlu dipertimbangkan oleh mahkamah adalah: (a) sama ada mahkamah ini mempunyai bidang kuasa mendengar notis usul ini yang telah diputuskan oleh hakim Mahkamah Tingi yang terdahulu; dan (b) sama ada pemohon telah menujukkan keadaan khas untuk penangguhan pelaksanaan

H

perintah.

Diputuskan, menolak permohonan:

I

(1) Permohonan jaminan adalah merupakan perintah interlekutori yang boleh dikemukakan permohonannya secara berulang. Namun demikian, di dalam kes ini permohonan pemohon adalah untuk penangguhan pelaksanaan hukuman di mana natijah daripada kebenaran permohonan tersebut, jaminan akan ditawarkan kepada pemohon. Ini bermakna pemohon perlu mendapatkan perintah penangguhan pelaksanaan

hukuman. Oleh itu mahkamah mendapati bahawa perintah penggantungan pelaksanaan hukuman perlu dibezakan dengan perintah jaminan (lihat perenggan 7).

(2) Mahkamah berpendapat apabila sesuatu permohonan penangguhan pelaksanaan ditolak, ia haruslah dirayu dan tidak boleh dikemukakan permohonan yang sama di mahkamah yang sama atau bidang kuasa yang sama. Ini adalah disebabkan mahkamah tersebut memutuskan permohonan tersebut berdasarkan merit yang terdapat di dalam permohonan tersebut. Walaupun permohonan ini adalah suatu yang berbentuk interlokutori namun ia adalah berdasarkan kepada merit dan prinsip-prinsip undang-undang berkenaan dengan penangguhan pelaksanaan. Oleh itu, apabila Mahkamah Tinggi Malaya di Temerloh telah membuat keputusan menolak permohonan penagguhan pelaksanaan yang mana keputusan tersebut telah dirayu kepada Mahkamah Rayuan, mahkamah ini tidak boleh mendengar sekali lagi permohonan tersebut dan mengakaskan keputusan tersebut (lihat perenggan 10 & 14).

(3) Seksyen 311 Kanun Tatacara Jenayah telah memperuntukkan bahawa apabila rayuan difailkan ia tidak secara automatik menjadikan hukuman yang dijatuhkan akan tertangguh. Berdasarkan kepada affidavit yang difailkan dan alasan yang dikemukakan mahkamah mendapati bahawa masalah kesihatan yang dihadapi oleh pemohon tidaklah mewajarkan permohonan penangguhan pelaksanaan ini dibenarkan. Ini adalah disebabkan perakuan pegawai perubatan tersebut hanyalah berkenaan dengan penyakit yang dihidapi oleh pemohon. Pegawai perubatan tidak menyatakan secara jelas adakah pemohon memerlukan rawatan khusus dan berkala yang tidak dapat disediakan di dalam penjara. Isu tentang kemungkinan pemohon akan terdedah dengan virus Covid-19 tidak disokong dengan apa-apa dokumen atau pengesahan bahawa pemohon akan dijangkiti virus tersebut semata-mata disebabkan dia ditempatkan di penjara tersebut. Apa yang ada di dalam kes ini ialah anggapan dan kemungkinan yang diduga akan berlaku kepada pihak pemohon. Ini tidak mencukupi bagi menunjukkan bahawa ia adalah satu keadaan khas bagi membolehkan pelaksanaan hukuman ditangguhkan (lihat perenggan 18 & 25–26).

[English summary

The applicant was convicted for a charge under s 14(a) of the Sexual Offences Against Children Act 2017 and sentenced to six years imprisonment, three strokes of the cane and police supervision for one year. The applicant had filed a notice of motion in this court to seek a stay of execution of the sentence and bail pending an appeal in the High Court ('the applicant's application'). A similar notice of motion was filed in the High Court of Malaya in Temerloh and the application was dismissed by the High Court judge. In this applicant's

A application, the applicant stated that he had health problems namely diabetes and high blood pressure. The issues to be considered by the court were: (a) whether this court had jurisdiction to hear this notice of motion which had been decided by the previous High Court judge; and (b) whether the applicant had shown special circumstances for the stay of execution of the order.

B

Held, dismissing the application:

(1) An application for bail was an interlocutory order which could be submitted repeatedly. Nevertheless, in this case the applicant's C application was for a stay of execution of the sentence whereby as a result of the granting of the application, bail would be offered to the applicant. This meant that the applicant would have to obtain a stay order of execution of the sentence. The court therefore found that an order for stay of the execution of a sentence should be distinguished from a bail D order (see para 7).

(2) The court was of the opinion that when an application for stay of execution was rejected, appeal should be filed, and the same application could not be submitted in the same court or the same jurisdiction. This E was because the court decided the application based on the merits contained in the application. Although this application was an interlocutory one, but it was based on the merits and principles of law regarding the stay of execution. Therefore, when the High Court of Malaya in Temerloh had decided to dismiss the stay of execution F application for which the decision had been appealed to the Court of Appeal, this court could not hear the application again and reverse the decision (see paras 10 & 14).

(3) Section 311 of the Criminal Procedure Code had provided that when an G appeal was filed, it did not automatically render the sentence passed to be stayed. Based on the affidavit filed and the reasons submitted the court found that the health problems faced by the applicant did not justify the granting of the application for stay of execution. This was because the medical officer's report was only in respect of the illness suffered by the H applicant. The medical officer did not clearly state whether the applicant required specific and periodic treatment that could not be provided in prison. The issue of the possibility that the applicant would be exposed to the Covid-19 virus was not supported by any document or confirmation that the applicant would be infected with the virus simply because he was I placed in the prison. What was at stake in this case was the presumption and likelihood that it would happen to the applicant. This was not sufficient to show that it was a special circumstance to allow the execution of the sentence to be stayed (see paras 18 & 25–26).]

Undang-undang yang dirujuk

Azmi bin Osman v Public Prosecutor and another appeal [2016] 3 MLJ 98; [2015] 9 CLJ 845, MR (dirujuk)
Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2011] 5 MLJ 535; [2011] 7 CLJ 253, MR (dirujuk)
Goh Beow Yam v Reg [1956] 1 MLJ 251 (dirujuk)
Jaferi bin Ipee v Public Prosecutor [2013] 3 MLJ 467; [2013] 3 CLJ 381, MR (dirujuk)
KWK (A child) v Public Prosecutor [2003] 4 MLJ 479; [2003] 4 CLJ 51, MR (dirujuk)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; [2003] 4 CLJ 1, MP (dirujuk)
Kwan Wah Yip & Anor, Re [1954] 1 MLJ 146b; [1954] 1 LNS 78 (dirujuk)
Michael Lee @ Weng Onn Lee v Public Prosecutor [1999] 1 MLJ 171, MT (dirujuk)
Mohd Razip v Public Prosecutor [1988] 1 MLJ 84 (dirujuk)
Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak [2019] 4 MLJ 421; [2019] 6 CLJ 561, MP (dirujuk)
Pendakwa Raya lwn Sulaiman bin Saidin [2010] 3 MLJ 383; [2010] 1 CLJ 575, MR (dirujuk)
Sulaiman bin Kadir v Public Prosecutor [1976] 2 MLJ 37 (dirujuk)

Undang-undang yang dirujuk

Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 s 14(a)
Kanun Keseksaan s 376
Kanun Tatacara Jenayah s 311

Rahamathullah Baharudeen (Rahamat & Mahsuri) bagi pihak pemohon.
Syairah Mohamad Razali (Timbalan Pendakwa Raya) bagi pihak responden.

Roslan Mat Nor PK:

[1] Pemohon melalui notis usul bertarikh 7 Julai 2021 memohon pelaksanaan hukuman yang dikenakan ke atas beliau bagi pertuduhan di bawah s 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 ditangguhkan. Pemohon telah disabitkan dengan pertuduhan tersebut dan dijatuhi hukuman penjara enam tahun penjara, tiga kali sebatan dan pengawasan polis selama satu tahun.

[2] Pemohon juga meminta dibenarkan jaminan sementara rayuan beliau didengar di Mahkamah Tinggi. Di samping itu memohon jaminan yang dikenakan itu tidak melampau.

[3] Pemohon menyatakan bahawa permohonan ini adalah disebabkan

beliau adalah seorang bujang dan menanggung keluarga. Di samping itu, tempoh masa yang panjang akan diambil untuk pelupusan rayuan. Ini disebabkan hakim mahkamah sesyen perlu menyediakan alasan penghakiman dan rekod rayuan yang masih belum disiapkan sehingga kini.

[4] Notis usul yang sama telah difailkan oleh pemohon di Mahkamah Tinggi Malaya di Temerloh melalui Permohonan Jenayah No CB-44-2–03 Tahun 2021. Pada 23 Mac 2021, Hakim Mahkamah Tinggi Malaya di Temerloh telah menolak notis usul tersebut. Pemohon telah memfailkan notis rayuan ke Mahkamah Rayuan terhadap keputusan tersebut pada 30 Mei 2021 dan telah didaftarkan sebagai C-05–218–06 Tahun 2021.

ADAKAH MAHKAMAH INI MEMPUNYAI BIDANG KUASA MENDENGAR NOTIS USUL INI YANG TELAH DIPUTUSKAN OLEH HAKIM MAHKAMAH TINGI YANG TERDAHULU

[5] Peguam pemohon yang bijaksana berhujah bahawa mahkamah ini mempunyai bidang kuasa untuk mendengar permohonan ini. Ia adalah disebabkan terdapat alasan baharu di dalam notis usul yang lalu. Timbalan pendakwa raya bersetuju dengan hujahan pemohon berkenaan dengan isu ini. Permohonan di dalam notis usul ini menyatakan bahawa beliau mempunyai masalah kesihatan penyakit kencing manis dan tekanan darah tinggi. Ini disokong oleh perakuan pegawai perubatan Penjara Bentong yang mengesahkan pemohon memerlukan rawatan berkala. Beliau telah menukilkan kes *Michael Lee @ Weng Onn Lee v Public Prosecutor* [1999] 1 MLJ 171. Fakta dalam kes tersebut menunjukkan bahawa terdapat dua kali permohonan menetapkan jaminan di mahkamah sesyen yang gagal. Beliau juga gagal membuat permohonan jaminan di Mahkamah Tinggi. Hakim KC Vohrah menyatakan seperti berikut:

> As stated earlier, two unsuccessful applications for bail were pursued in the sessions court and before the application for bail in this court, there was an application in High Court No 2 for bail which was turned down. An application for bail can be made to the High Court in any event of an unsuccessful application in any subordinate court, without resort to an appeal to the High Court against the refusal to give bail (see s 389 of the CPC and *Sulaiman bin Kadir v Public Prosecutor* [1976] 2 MLJ 37).
>
> There is persuasive authority (see the Singapore case of *Mohamed Razip & Ors v Public Prosecutor* [1988] 1 MLJ 84) and it is a prevailing practice that there can be renewed application for bail in the High Court, provided that the consideration of the court on the reapplication for bail should touch on a material change of circumstances and not circumstances which were considered in the application before the earlier court, as to do that would surely be to constitute the later court of co-ordinate jurisdiction as an appellate court.

[6] Mahkamah juga meneliti kes *Sulaiman bin Kadir v Public*

Prosecutor [1976] 2 MLJ 37. Di dalam kes tersebut perayu telah mengemukakan permohonan jaminan di mahkamah sesyen Khas bagi kesalahan di bawah s 376 Kanun Keseksaan ditolak oleh mahkamah sesyen. Yang Arif Hakim telah menjelaskan bahawa pemohon yang jaminannya yang telah ditolak boleh mengemukakan permohonan jaminan baharu untuk pertimbangan semula. Ini dinyatakan di halaman 37 para (f) seperti berikut:

> There does not appear to be any authority as to which is the proper course to take in such cases. In my view, if aperson should not be kept in custody for a moment longer than is necessary then the speedy procedure of section 389 is obviously indicated. But there are other compelling reasons why section 389 is the appropriate procedure. That section gives the High Court absolutediscretionary powers to vary bail from time of arrest right up to the time of conviction. It may grant bail when bail has been refused. It may reduce the amount of bail if the amount is excessive. It may increase the amount of bail if the amount is insufficient. But it may not order custody if bail has been granted. The appeal provisions of section 394 of the Criminal Procedure Code, on the other hand, are intended to deal with matters not provided for under section 389 of the Criminal Procedure Code, for instance, if an accused person had been admitted to bail by a Subordinate Court contrary to section 388(i) of the Criminal Procedure Code. As this application arises out of a refusal to grant bail, the provisions of section 389 apply and I accordingly hold thatit is properly before this court.

Perkara yang sama dinyatakan di dalam kes *Mohd Razip v Public Prosecutor* [1988] 1 MLJ 84 oleh Mahkamah Rayuan di Singapura.

[7] Ia menunjukkan bahawa permohonan jaminan adalah merupakan perintah interlekutori yang boleh dikemukakan permohonannya secara berulang. Namun demikian, di dalam kes ini permohonan pemohon adalah untuk penangguhan pelaksanaan hukuman di mana natijah (*effect*) daripada kebenaran pelaksanaan itu jaminan akan ditawarkan kepada pemohon. Ini bermakna pemohon perlu mendapatkan perintah penangguhan pelaksanaan hukuman. Oleh itu pada hemat mahkamah perlu dibezakan perintah penggantungan pelaksanaan hukuman dengan perintah jaminan. Mahkamah Tinggi Malaya, Temerloh telah menolak pemohonan penangguhan pelaksanaan hukuman pada 23 Mac 2021. Bolehkah mahkamah ini mendengar sekali lagi permohonan penangguhan pelaksanaan hukuman? Jika ini dijawab dengan positif ia membawa maksud permohonan untuk penggantungan pelaksanaan boleh dibuat berulang kali selagi Mahkamah Rayuan tidak membuat keputusan muktamad kepada rayuan jenayah tersebut. Jika jawapannya negatif, kegagalan mendapatkan penggantungan pelaksanaan, rayuan perlu difailkan dan ianya tidak boleh dikemukakan kepada mahkamah yang sama untuk kali kedua.

[8] Bagi memahami keadaan ini adalah wajar untuk meneliti apakah hakikat penangguhan pelaksanaan hukuman. Seksyen 311 menyatakan seperti berikut:

A Except in the case of a sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the Court below or a Judge may stay execution on any judgment, order, conviction or sentence pending appeal, on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment B ordered by or in the judgment, order, conviction or sentence as to the Court below or to the Judge may seem reasonable.

[9] Apa yang jelas ialah pihak yang telah disabitkan di dalam suatu kes jenayah boleh memohon penangguhan pelaksanaan hukuman. Ia boleh dibuat C di mahkamah di mana hukuman itu dijatuhkan (mahkamah rendah) atau di Mahkamah Tinggi. Ia telah dinyatakan di dalam kes *Sulaiman bin Kadir* dan *Mohamed Razip* di atas. Apa yang menjadi penelitian ialah perkataan yang digunakan di dalam kes-kes tersebut iaitu (*bail pending appeal*) yang digunakan secara bergantian dengan penangguhan pelaksanaan hukuman (*stay of* D *execution of sentence*). Ia menjelaskan bahawa bidang kuasa Mahkamah untuk menawarkan jaminan boleh dikaji semula oleh mahkamah yang sama apabila terdapat perubahan keadaan pemohon. Di dalam keadaan tersebut permohonan jaminan boleh dibenarkan oleh mahkamah yang sama atau yang mempunyai bidang kuasa yang setara seperti yang terdapat di dalam kes E *Michael Lee @ Weng Onn Lee v Public Prosecutor* [1999] 1 MLJ 171.

[10] Sebaliknya, permohonan untuk penangguhan pelaksanaan hukuman adalah budi bicara Mahkamah. Ia juga boleh dilakukan oleh mahkamah rendah di mana pihak itu telah dijatuhi hukuman. Seksyen 311 Kanun F Tatacara Jenayah yang memperuntukkan kuasa Mahkamah Rendah tersebut. Ia juga boleh dilaksanakan oleh Mahkamah Tinggi. Mahkamah berpendapat apabila sesuatu permohonan penangguhan pelaksanaan ditolak, ia haruslah dirayu dan tidak boleh dikemukakan permohonan yang sama di mahkamah yang sama atau bidang kuasa yang sama. Ini adalah disebabkan mahkamah G tersebut memutuskan permohonan tersebut berdasarkan merit yang terdapat di dalam permohonan tersebut. Walaupun permohonan ini adalah suatu yang berbentuk interlokutori namun ia adalah berdasarkan kepada merit dan prinsip-prinsip undang-undang berkenaan dengan penannguhan pelaksanaan seperti yang dinyatakan oleh Mahkamah Persekutuan di dalam kes *Public* H *Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2019] 4 MLJ 421; [2019] 6 CLJ 561 yang mengesahkan kedudukan prinsip permohonan penangguhan pelaksanaan di dalam kes jenayah oleh Mahkamah Rayuan di dalam *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 5 MLJ 535; [2011] 7 CLJ 253.

I **[11]** Ini perlu dibezakan dengan permohonan untuk jaminan sebelum perbicaraan, perubahan keadaan pemohon boleh menyebabkan mahkamah yang sama akan membenarkan jaminan sebelum bicara walaupun sebelum ini menolaknya. Mahkamah berpendapat apabila permohonan untuk penangguhan pelaksanaan dibuat ia adalah berkaitan dengan pemohon yang

telah disabitkan dengan pertuduhan jenayah dan memohon budi bicara mahkamah untuk menangguhkan pelaksanaan hukuman tersebut. Semasa menimbangkan permohonan tersebut mahkamah terikat dengan prinsip-prinsip penangguhan pelaksanaan seperti yang diputuskan di dalam kes *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* di atas dan *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1. Ia bukannya semata-mata berdasarkan kepada perubahan keadan pemohon. Oleh itu apabila keputusan telah dibuat oleh Mahkamah Tinggi, maka ia boleh dikemukakan rayuan ke Mahkamah Rayuan dan bukannya mengemukakan permohonan semula di mahkamah yang sama.

[12] Oleh itu, jika diteliti di dalam kes-kes permohonan penangguhan pelaksanaan yang gagal diperolehi di Mahkamah Rendah, tiada rayuan dikemukakan kepada keputusan tersebut. Sebaliknya satu notis usul difailkan di Mahkamah Tinggi bagi permohonan yang sama. Ia dibuat di Mahkamah Tinggi yang akan menggunakan prinsip-prinsip yang termaklum berkenaan penangguhan pelaksanaan hukuman. Sekiranya ia ditolak oleh Mahkamah Tinggi maka rayuan akan dikemukakan ke Mahkamah Rayuan dan akhirnya ke Mahkamah Tinggi seperti yang berlaku dalam kes *Dato' Seri Mohd Najib* di atas.

[13] Hal ini berlaku disebabkan s 311 Kanun Tatacara Jenayah memperuntukkan bahawa permohonan penangguhan itu boleh dibuat di Mahkamah di mana tertuduh disabitkan dan dijatuhi hukuman. Di samping itu permohonan juga boleh dibuat di Mahkamah Tinggi.

[14] Mahkamah berpendapat apabila Mahkamah Tinggi Malaya di Temerloh telah membuat keputusan menolak permohonan pelaksanaan pada 23 Mac 2021 yang telah dirayu kepada Mahkamah Rayuan melalui No C-05–218–06 Tahun 2021, mahkamah ini tidak boleh mendengar sekali lagi permohonan tersebut dan mengakaskan (*overrule*) keputusan tersebut. Mahkamah meneliti kes *Azmi bin Osman v Public Prosecutor and another appeal* [2016] 3 MLJ 98; [2015] 9 CLJ 845, *Pendakwa Raya lwn Sulaiman bin Saidin* [2010] 3 MLJ 383; [2010] 1 CLJ 575 dan *Jaferi bin Ipee v Public Prosecutor* [2013] 3 MLJ 467; [2013] 3 CLJ 381.

[15] Adalah tidak dinafikan di dalam kes *Azmi bin Osman* Mahkamah Rayuan telah memberi panduan sama ada Mahkamah Tinggi yang mempunyai bidang kuasa yang setara boleh mengenepikan keputusan yang telah dibuat oleh Mahkamah Tinggi yang lain dalam isu yang sama. Mahkamah Rayuan menyatakan seperti berikut:

> [28] With respect, we are of the view that the learned HCJ2 had erred when he disturbed the findings of the earlier HCJ1 who had ordered the accused to enter on

his defence to all the four charges, on appeal. The dominant issue that ought to guide the HCJ2's mind in dealing with a situation that has now become this preliminary issue must of necessity be the fact that when the HCJ1 made that decision for defence to be called, the latter was carrying out his appellate jurisdiction. *Granted that the High Court jurisdiction is coordinate among its judges, inherent in that concept is the fact that a High Court Judge cannot overrule another High Court judge who had made a decision at some crucial stage of proceedings in the same case.* In the context of this appeal before us, the HCJ1 had ordered the accused's defence to be called to answer to the four charges levelled against him. The jurisdiction to correct that purported error, said by the HCJ2 as having been committed by the HCJ1, with respect, lies with the Court of Appeal, should there be an appeal against the decision of the HCJ2. In other words, as much as a High Court Judge's decision does not bind his brother or sister judge on the High Court bench, by the same token, neither does it lie with his brother or sister judge of the High Court to overturn his decision in the same case. In a situation now prevailing in this case, the role of the HCJ2 is only limited to see whether the defence evidence as led has succeeded in creating a reasonable doubt in the prima facie case as found by the HCJ1 on appeal by the prosecution. With respect, this must be preferred position as to what the proper approach ought to be, as was employed by the Court of Appeal in *Sulaiman*'s case. Coordinate jurisdiction connotes parity and as such, it does not admit nor permit mutual overriding or overruling each other's decision. Only a higher appeal court can disturb or vary or affirm a High Court's decision.'

[16] Walaupun keputusan di dalam kes *Azmi bin Osman* tersebut adalah berkaitan dengan keputusan Mahkamah Tinggi yang terdahulu yang memanggil Perayu untuk membela diri yang pada pandangan Mahkamah Tinggi kedua adalah tidak teratur dan mengenepikan dapatan Hakim Mahkamah Tiggi pertama tersebut. Namun prinsip bahawa Mahkamah Tinggi tidak boleh mengakaskan (*overrule*) keputusan Mahkamah Tinggi yang telah dibuat sebelum itu. Di dalam kes ini mahkamah berpendapat bahawa keputusan Mahkamah Tinggi Malaya di Temerloh pada 23 Mac 2021 adalah berkaitan dengan isu yang sama dengan notis usul ini. Mahkamah Tinggi telahpun membuat keputusan dan rayuan telahpun difailkan. Walaupun semasa penghujahan lisan peguam pemohon telah memaklumkan bahawa sekiranya notis usul ini dibenarkan, rayuan ke Mahkamah Rayuan terhadap perintah pada 23 Mac 2021 itu akan ditarik balik. Mahkamah berpendapat tindakan sedemikian tidak mewajarkan notis usul ini dibenarkan.

ASAS PERMOHONAN

[17] Mahkamah berpendapat bahawa notis usul ini ditolak hanya berdasarkan kepada isu awalan di atas sahaja. Namun demikian bagi memastikan keadilan kepada pihak-pihak maka mahkamah mengambil kira asas permohonan ini.

[18] Seksyen 311 Kanun Tatacara Jenayah telah memperuntukkan bahawa apabila rayuan difailkan ia tidak secara automatik hukuman yang dijatuhkan akan tertangguh. Ia memperuntukkan seperti berikut:

> Except in the case of a sentence of whipping (the execution of which shall be stayed pending appeal), no appeal shall operate as a stay of execution, but the Court below or a Judge may stay execution on any judgment, order, conviction or sentence pending appeal, on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the judgment, order, conviction or sentence as to the Court below or to the Judge may seem reasonable.

[19] Prinsip ini sudah terungkap dengan mantapnya di bawah undang-undang pentadbiran keadilan jenayah. Apakah keadaan yang perlu ditimbangkan oleh mahkamah untuk satu hukuman ditangguhkan pelaksanaannya juga sudah tercatat dengan terang dan jelas melalui kes-kes mahkamah yang telah dilaporkan di dalam jurnal-jurnal undang yang tersohor. Namun demikian bagi tujuan mengingatkan prinsip tersebut adalah wajar dinukilkan beberapa nas undang-undang berkenaan dengannya. Mahkamah Persekutuan didalam kes *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2019] 4 MLJ 421; [2019] 6 CLJ 561 telah menjelaskan seperti berikut berkenaan penangguhan prosiding jenayah:

> [18] *More crucially and independently of the above, we shall now address the applicable test in the grant of stay in criminal proceedings. In his application before the Court of Appeal, the respondent relied on the decision of this court in Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1. In Kosma Palm Oil, this court held that the test applicable to the grant of a 'stay of execution' is whether there are special circumstances, the most common of which is whether the appeal would be rendered nugatory if a stay of execution is not granted (see paras [7]–[10]).
>
> [19] *Kosma Palm Oil* represents the legal position governing stays of execution for civil appeals (see: Tan, Kee Heng, Civil and Criminal Appeals in Malaysia, 3rd edn, (Sweet & Maxwell, 2016) at Chapter 7.3). The relevant question before us now is whether it applies with equal force to a stay of criminal proceedings at the trial court when there are pending appeals in respect of interlocutory applications before this court.
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> [20] On this point, we note that there is only one reported decision from the Court of Appeal affirming the proposition that Kosma is applicable. In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 5 MLJ 535; [2011] 7 CLJ 253, Abdul Malik Ishak JCA expressly endorsed the dual tests of 'special circumstances' and 'nugatoriness' propounded in Kosma (at para [81]) as being equally relevant in an application to stay a criminal proceeding. His Lordship further held that the background scenario, seriousness of the offence which the accused is currently facing, and the conduct of the defence in the trial (ie, the delaying tactics employed by the defence) are all relevant factors to be considered by the court in deciding whether a stay of proceedings in a criminal trial should be granted (at paras [88]–[90]).

[20] Sementara itu juga dirujuk kepada *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 5 MLJ 535; [2011] 7 CLJ 253 Hakim Abdul Malik Ishak semasa menimbangkan permohonan lisan peguam Karpal Singh untuk menangguhkan perbicaraan kes liwat yang sedang berjalan atas alasan ingin mengemukakan rayuan ke Mahkamah Persekutuan telah menyatakan:

> [82] At the end of the day, the court is free to adopt either approach be it the special circumstances approach or the nugatory approach, depending on the facts or circumstances of the case. The appellant has to show a valid reason or cause acceptable to us in order to justify our exercise of discretion for stay in favour of the appellant pending the hearing of the proposed appeal to the Federal Court. Regrettably the appellant failed to do so.
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> [83] *On the principles of stay, it is ideal to read the following authorities:*
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> (a) *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380, CA;
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> (b) *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257; [2003] 4 CLJ 1, FC; and
>
> (c) *Walter Pathrose Gomez & Ors v. Sentul Raya Sdn Bhd* [2005] 7 CLJ 385, HC.
>
> [84] *Be that as it may, there are passages that appear in the judgment of this court in Che Minah Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 5 MLJ 206; [2008] 3 CLJ 653, at pp 668 to 669; [2008] 3 AMR 365 at p 377, at p 221 that merit reproduction. We will now reproduce them (see the CLJ reporting):
>
> [35] In the common law world over the past decade there is rooted in our legal system the fundamental belief that judges who adjudicate must always do so without bias or prejudice and it must be perceived to be so. It is a correct assertion to say and I so say that a judge must be impartial and it is his impartiality that forms the core attribute of the judiciary. The presumption of impartiality of a judge must be upheld. It is the cornerstone of the judiciary. No one should carelessly argue that a particular judge is biased because the credibility of the judge depends on the presumption of his impartiality. And that presumption is deeply rooted in our legal system. That being the case, the burden is on the party arguing for a disqualification to establish that the circumstances justify the finding that the judge must be disqualified. Put it in another way, the onus of demonstrating bias lies with the person who is alleging that it is so. In *R v Smith & Whiteway Fisheries Ltd* [1994] 133 NSR (2d) 50 (CA), at pp 60 to 61, the court observed that the reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect.
>
> [36] There is a passage that appears in the case of *United States v Morgan* 313 US [1941] at p 421 that merits reproduction. It is this. That judges 'are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' This is food for thought for the appellant and her learned counsel.
>
> [85] We venture to say that judges can disabuse their minds of any irrelevant personal beliefs or predispositions; and that judges must take into account the fact and the reality that they have a duty to sit in any case and they are not obliged to recuse themselves.

[86] It is common knowledge that in all common law jurisdictions, a judge takes a judicial oath on appointment. It is because of this judicial oath and the presumed impartiality of the judges that the notion of a 'duty to sit' comes to the forefront. In *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495, CA, the New Zealand Court of Appeal aptly said that (see p. 504):

> The requirement of independence and impartiality of a Judge is counterbalanced by the Judge's duty to sit, at least where grounds for disqualification do not exist in fact or in law. This duty in itself helps protect judicial independence against manoeuvring by parties hoping to improve their chances of having a given matter determined by a particular judge or to gain forensic or strategic advantages through delay or interruption to the proceeding. As Mason J emphasised in *Re JRL; ex p CJL* [1986] 161 CLR 342, at p 352:
>
> [I]t is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

[87] And according to Abdul Hamid Mohamad FCJ (later the Chief Justice of Malaysia) in Dato' Tan Heng Chew 's case, at p 588: What is more important is the integrity and honesty of the judges themselves.

[88] All these must be taken into account as the background scenario, in determining whether to allow the stay. It must be emphasised that the seriousness of the offence which the appellant is currently facing is a relevant factor for refusing to grant the stay.

[89] In Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3) (supra), at p. 279, the conduct of the defence in the trial was taken into account and the court denying the accused's application for a stay of execution pending appeal relied in part on the accused's reliance on tampered evidence and recourse to after thoughts.

[90] Here, the delaying tactics engineered by the appellant should be a factor in refusing to grant the stay.

[91] For these varied reasons, we dismissed the appellant's oral application to stay the sodomy trial proceedings pending the outcome of his proposed appeal to the Federal Court.

[21] Di dalam kes *Goh Beow Yam v Reg* [1956] 1 MLJ 251 mahkamah telah mengesahkan keputusan majistret yang menolak jaminan setelah pemohon disabitkan bagi kesalahan memiliki Chandu dan peralatan menghisap Chandu. Alasan yang diberikan dalam kes tersebut ialah tertuduh ingin menukar pengakuan bersalah kepada pengakuan tidak bersalah. Hakim Whyatt CJ menyatakan:

> I respectfully agree with the views expressed by Mr. Spenser Wilkinson J in that case but I would add that the considerations enumerated by him, which I regard as amplifying and not conflicting with the judgment of the Chief Justice in *R v Tan Tee* [1948] MLJ 153, should not be regarded as an exhaustive list. It is clear, for instance,

A that if an accused has pleaded guilty that fact must be considered by the Magistrate when exercising his jurisdiction and doubtless other matters, depending upon the circumstances of individual cases, will require consideration from time to time.

B **[22]** Mahkamah juga merujuk kepada kes *KWK (A child) v Public Prosecutor* [2003] 4 MLJ 479; [2003] 4 CLJ 51 di mana Mahkamah Rayuan telah menghuraikan faktor-faktor yang perlu diambilkira dalam permohonan untuk penangguhan pelaksanaan seperti berikut:

C In this case it is clear that the subject is a first offender. His probation report is favourable to him. But these are only some of the factors that must be considered. There are other, and more significant, factors for deliberation which we will now do so.

(a) Gravity Or Otherwise Of The Offence

D There can be no dispute that the offence of murder under s 302 of the Penal Code for which the subject has been found guilty is a very serious one indeed. However, we are not suggesting that in very serious offences, as the one in this case, there can be no stay. What we do say is that the graver the offence the less likely it may be for the discretion to be exercised in favour of a stay. In this regard we refer to Criminal Procedure by John B Bishop 2nd edn which says at p 241:

E > The gravity of the offence with which an applicant for bail is charged has always been regarded as an important matter to be taken into consideration. In practice, it is the first matter that a court considers. Put simply, the more serious the offence the weaker the presumption in favour of bail; and, conversely, the less serious the offence the stronger the presumption in favour of bail.

F (b) Whether There Are Difficult Points Of Law Involved

In *R v Southgate* [1960] 78 WB (NSW) 44 it was held that a conviction resulting from a trial must be taken, until the contrary is shown, to have been properly conducted and without error of law. The error, if any, must be an obvious defect on
G the face of the record (see *Re Kwan Wah Yip & Anor* [1954] 1 MLJ 146b; [1954] 1 LNS 78). It must have an extraordinarily high prospect of success and must be one which can be seen without detailed argument to be certain to succeed (see *R v Velevski* [2000] NSWCCA 445). That is logical as otherwise a bail application will end up as the hearing of an appeal and lead to the pre-judgment of contested issues.
H As submitted by the learned Deputy Public Prosecutor the records are not before the court. It is therefore not possible for us to be in a position to detect any error. In any event the point of law raised by learned counsel is one that requires detailed argument and is not one which is an obvious defect on the face of the record. It is therefore one that cannot be considered now for the purpose of the motion. For the same reason we are unable to consider the case of Director of Public Prosecutions of
I *Jamaica v.Mollison* [2003] 2 WLR 1160 submitted by the defence at the last minute in support of an argument that s 97(2) of the Act is unconstitutional.

(c) *The Length Of The Term Of Imprisonment In Comparison With The Length Of Time Which Is Likely To Take For The Appeal To Be Heard*

The likelihood that an applicant will have served the whole or a very substantial part of the sentence before his appeal is heard is often regarded as sufficient to satisfy the requirement of special circumstances; always depending on the nature of the offence and other attendant factors (see *Re Jackson* [1997] 2 VR 1The sentence imposed on the subject in this case is for an indeterminate period. It is dependent on the recommendation that may be made by the Board of Visitors pursuant to s 97(4) of the Act. It is therefore not possible to predict the length of the subject's detention. Therefore, what is more significant in this case is the length of time that is likely to take for the appeal to be heard. In cases such as *Kashmira Singh v State of Punjab AIR* [1977] SC 2147 and *Babu Singh & Ors v State of Uttar Pradesh AIR* [1978] SC 527 it was held that so long as the court is not in a position to hear the appeal of an accused within a reasonable period of time, the court should ordinarily, unless there are cogent reasons for acting otherwise, release the accused on bail. In this regard we must confine ourselves only to the length of time that will take for the appeal to be heard in the Court of Appeal. We cannot take into account the further time that will be taken for the appeal to be heard in the Federal Court. If we do so it will be tantamount to a stay being granted at this stage for the hearing of the appeal in the Federal Court in the future as well.

We accept the fact that there are 175 criminal appeals which are ready for hearing in the Court of Appeal. We are unable to say when the appeal of the subject will be heard. From our experience, however, we can safely say that it may take about a year or so for a criminal appeal from the High Court to be heard. That cannot be said to be an unreasonable period of time to wait for the hearing of the appeal. Be that as it may, the subject may also apply to the President of the Court of Appeal for an early hearing date who may, perhaps, be guided by s 95(3) of the Act which provides that the High Court shall, in all criminal appeals originating from a Court for Children, make its final decision within twelve months after the notice of appeal has been filed. This will not, as contended by learned counsel, conflict with art 8(1) of the Federal Constitution. Rule 22 of the Rules of the Court of Appeal 1994 specifically empowers the President of the Court of Appeal to order the early hearing of an appeal. In any event, it must be observed that in this case the decision against the subject was only made in July 2003. The record of appeal must be in the midst of preparation now. The appeal to the Court of Appeal is therefore at a very early stage; it is difficult to say how fast the appeal will take to be heard; and as far as we know no application has been made to the President of the Court of Appeal for an early hearing date. In the circumstances it would be speculative and premature to say that the appeal will take a long time to be heard. This reasoning militates against the grant of a stay. In support we refer to Bail: Law and Practice by MR Mallick 3rd edn where it says at p 175:

> The Division Bench has found that the accused persons have been sentenced to life imprisonment only on 12th November 1997 and has preferred appeal in January 1998 and it is not a case in which they have served out 5 or 6 years in imprisonment or a major part of life imprisonment, that it is premature to say that the appeal will not be heard within a reasonable period of time and that it is premature to consider his release on bail on the ground that there would be delay in hearing the appeal specially when the charges against them are grave in nature (*Yusuf Gain v State of WB Cal LT* [1998] (2) HC 588). In our opinion therefore, it is premature to consider the question of the length of time it will take for the

A appeal in this case to be disposed of at this stage.

[23] Sementara itu di dalam kes *Re Kwan Wah Yip & Anor* [1954] 1 MLJ 146b; [1954] 1 LNS 78 Spencer Wilkinson menyatakan seperti berikut:

B Obviously the Court or the Judge has a discretion. In my view a stay of execution should not be granted and will not be granted by me unless there are special reasons for so doing, and the mere fact that a notice of appeal has been given is no sufficient reason. The only other reason given in this case is that the applicant who has been advised verily believes he has good grounds for appeal. That, also in my view does not constitute grounds for releasing an applicant pending appeal.

C

I have no means of knowing whether the above cited decisions of Fisher J were brought to the attention of the Court in this later case. With the greatest respect to the views expressed by Fisher J. I think the relevant section of the Criminal Procedure Codes (s. 305 of the Strait Code) must be construed as giving the Courts a discretion. The operative words of that section so far as a sentence of imprisonment is concerned are as follows:

D

No appeal shall operate as a stay of execution but the Courts below and the High Court may stay execution on any ... conviction or sentence pending appeal on such terms as to ... the suffering of any punishment ordered ... as to the Court seem reasonable.

E

Had the Legislature intended that a stay of execution should always be granted it would no doubt have so provided as it has in the case of whipping. To interpret the section in the way Fisher J did seems to me to have the result that bail is to be automatically granted in almost every case — a result which the Legislature appears to me to have intended to prevent.

F

I find myself, with respect, in agreement with Wilson J when he says that obviously the Court or the Judge has a discretion. It remains to consider upon what grounds that discretion should be exercised.

G The Deputy Public Prosecutor cited certain English authorities with regard to the granting of bail in England pending appeal to the Court of Criminal Appeal, and it is quite clear that bail is only granted in England by that Court in exceptional circumstances. I do not think, however, that quite the same considerations apply in regard to appeals from the Subordinate Courts to the High Court, so that I do not think these authorities are of much assistance in dealing with the question now before me.'

H

ADAKAH PIHAK PEMOHON TELAH MENUJUKKAN KEADAAN KHAS UNTUK PENANGGUHAN PELAKSANAAN PERINTAH?

I **[24]** Pemohon dalam affidavitnya menyatakan bahawa beliau mempunyai masalah kesihatan iaitu berpenyakit kencing manis dan tekanan darah tinggi. Ini telah disokong oleh catatan yang dikeluarkan oleh pegawai perubatan penjara. Persoalannya ialah adakah alasan tersebut memadai untuk notis usul ini dibenarkan.

[25] Berdasarkan kepada affidavit yang difailkan dan alasan yang dikemukakan mahkamah berpendapat bahawa masalah kesihatan yang dihadapi oleh pemohon tidaklah mewajarkan permohonan penangguhan pelaksanaan ini dibenarkan. Ini adalah disebabkan perakuan pegawai perubatan tersebut hanyalah berkenaan dengan penyakit yang dihidapi oleh pemohon. Pegawai perubatan tidak menyatakan secara jelas adakah pemohon memerlukan rawatan khusus dan berkala yang tidak dapat disediakan di dalam penjara.

[26] Di dalam hujahan lisannya peguam juga membangkitkan isu berkenaan kemungkinan pemohon akan terdedah dengan virus Covid-19. Ini adalah disebabkan beliau ditempatkan di kawasan penjara yang mungkin akan mendedahkan dijangkiti dengan lebih mudah dibandingkan sekiranya beliau diberikan jaminan dan keluar daripada penjara tersebut. Mahkamah berpendapat bahawa kemungkinan-kemungkinan tersebut tidak disokong dengan sebarang dokumen atau pengesahan bahawa pemohon akan dijangkiti virus tersebut semata-mata disebabkan beliau ditempatkan di penjara tersebut. Adalah tidak dapat dinafikan bahawa pihak penjara adalah bertanggung jawab untuk mengambil langkah-langkah yang sewajarnya bagi memastikan tahanan adalah selamat dan mempunyai tahap kesihatan yang sewajarnya dalam menghadapi pandemik Covid-19. Setakat ini tiada keterangan yang dikemukakan dalam affidavit permohonan pemohon yang menunjukkan bahawa Jabatan Penjara Malaysia telah tidak mengambil tindakan-tindakan yang sewajarnya bagi melindungi pemohon daripada terdedah kepada virus Covid-19 tersebut. Apa yang ada ialah anggapan dan kemungkinan yang diduga akan berlaku kepada pihak pemohon. Ini pada hemat mahkamah tidak mencukupi bagi menunjukkan bahawa ia adalah satu keadaan khas bagi membolehkan pelaksanaan hukuman ditangguhkan.

[27] Oleh yang demikian permohonan pihak pemohon ditolak.

Permohonan ditolak.

Dilaporkan oleh Dzulqarnain Ab Fatar